

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

ROGER L. ARBOGAST,

Plaintiff,

v.

CIVIL ACTION NO. 1:00CV58
(Judge Keeley)

MONONGALIA COUNTY JAIL;
TAMMY BELLEDINA, Administrator of
Monongalia County Jail;
DEE HENDERSON, Corrections Officer,
Monongalia County Jail;
TONY BARILL, Sheriff of Monongalia
County, West Virginia; and
MONONGALIA COUNTY COMMISSION;

Defendants,

ORDER DENYING DEFENDANTS' MOTION TO DISMISS AND
REFERRING CASE TO MAGISTRATE JUDGE FOR FURTHER DISPOSITION

On April 19, 2000, the Court conducted a status conference regarding the captioned case, at which time it considered the merits of the defendants' motion to dismiss.

Standard of Review

In ruling on a motion to dismiss under Fed. R. Civ. P. 12(b)(6), "the Court must take all well-pleaded material allegations as admitted, but conclusions of law and unwarranted deductions of fact are not admitted. A complaint may be dismissed if the law does not support the conclusions argued, or where the facts alleged are not sufficient to support the claim presented." Mylan Laboratories, Inc. v. AKZO, N.V., 770 F. Supp. 1053, 1059 (D. Md. 1991). A complaint should not be dismissed unless it appears to a certainty that there is no set of

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facts which could be proved to support a claim or which would entitle the plaintiff to relief. 2A Moore's Federal Practice § 12.08 at 2271-74 (2d Ed. 1983).

Discussion

Assuming all well-pleaded facts of the complaint to be true, it cannot be said that Arbogast has failed to show that his "request for dentures is urgently required. . . .", as was suggested by the defendants. To the contrary, Arbogast plainly has alleged that "it is hard for [him] to chew food they feed [him]," and that his "appearance is differant (*sic*)" and he has "lost weight." Specifically, he testified during the status conference that he must hold a fork and knife to his lips while he chews in order to prevent food from falling out, because his gums do not touch. He also stated that he has developed digestive problems from being unable to chew the food provided by the defendants, and that he has lost twenty (20) pounds since the removal of his teeth.

Moreover, although defendants allege that they have no legal duty or obligation to provide Arbogast false teeth or dentures, this bald assertion is unsupported by applicable statutory and case law. W.Va. Code §7-8-2 requires a sheriff, as keeper of a jail, to provide a sick prisoner "adequate medical and dental attention and nursing. . . ."

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The Attorney General of West Virginia stated thirty-seven (37) years ago that this statutory language is "broad" and is to be construed liberally. See 50 Op. Att'y Gen. 493 (1963). Accordingly, the Attorney General then found it incumbent upon the Monongalia County Court [now County Commission] to pay the dental expenses for extraction of two prisoners' teeth (one prisoner had 4 teeth extracted, the other 16).

Although it is true that no court in West Virginia has ruled that providing an inmate adequate dental care includes providing dentures or false teeth, courts in other jurisdictions have found that failure to provide dentures may constitute a claim of "deliberate indifference" to a prisoner's "serious medical needs" under §1983. See Hunt v. Dental Dep't, 865 F.2d 198 (9th Cir. 1988); and Jackson v. Wharton, 687 F.Supp. 595 (M.D. Ga. 1988) (dismissed because inmate could not prove the "serious nature" of his medical need for dentures because, after he obtained them, he wore them only for cosmetic purposes and removed them while eating). See also Large v. Washington Co. Detention Ctr., No. 90-6610, 1990 WL 153978 (4th Cir. Oct. 16, 1990) ("[T]here is ample authority recognizing that the failure to provide comparable basic corrective/medical devices [such as hearing aids, eyeglasses, dentures,

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etc.] may amount to deliberate indifference to a serious medical need.")

Certainly, it is too early for a final determination that plaintiff Arbogast had a "serious need" for dentures to which the defendants were deliberately indifferent. By the same token, however, the claim on its face is not a frivolous one.

Additionally, despite defendants' contrary suggestion, Arbogast's complaint on its face does satisfy the prerequisites of 42 U.S.C. §1983. It alleges: (1) an acute physical condition [no teeth]; (2) the urgent need for medical care ["can't chew food", "lost weight"]; (3) the failure or refusal to provide it ["trying to get me out of here with no teeth at all"]; (4) tangible residual injury ["lost weight", "changed appearance"]; and (5) circumstances [as enumerated in (1) - (4)] that will shock the judicial conscience.

Finally, defendants' claim that they are entitled to immunity under the West Virginia Governmental Tort Claims Immunity Act ["the Act"], W.Va. Code § 29-12-1, et seq., is plainly wrong. Section 29-12-18(e) clearly states that the Act "does not apply to, and shall not be construed to apply to civil claims based upon alleged violations of the constitution or statutes of the United States. . . ."

Accordingly, the Court **DENIES** the defendants' motion to dismiss.

ORDER

It is so **ORDERED**.

It is further **ORDERED** that, pursuant to Title 28, United States Code §§ 636(b)(1)(A) and (B), and for reasons appearing to the Court, this action be, and hereby is, referred to the Honorable David L. Core, United States Magistrate Judge, who is hereby designated and authorized to consider the record and do all things proper to consider on the merits of plaintiff's requests for injunctive and monetary relief, including, without limitation, appointing counsel for the plaintiff, if deemed necessary; conducting a hearing on the plaintiff's request for injunctive relief; entering an Order concerning any the disposition of any non-dispositive motions hereafter filed; and entering into the record a written Report and Recommendation for Disposition.

The clerk is directed to transmit copies of this order of referral to the *pro se* plaintiff, to counsel of record herein and to the Honorable David L. Core, United States Magistrate Judge.

ENTERED: April 21, 2000.

/s/

IRENE M. KEELEY
UNITED STATES DISTRICT JUDGE